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**From:** Eisenberg, Mindy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CFB4C26BB6F44C7DB69F9884628B3EF9-EISENBERG, MINDY]  
**Sent:** 6/21/2017 10:14:38 PM  
**To:** Jennifer Carr [jcarr@ndep.nv.gov]  
**Subject:** RE: 404 permitting and JD question

Hi Jennifer,

Sorry for taking a while to get back to you. I asked staff to send me a correct answer 😊

The answer to your question is not a simple yes or no, but it is not complicated either.

When a state assumes administration of the CWA section 404 program, the state will be making determinations regarding whether a CWA 404 permit is needed, and if so, then deciding to approve or deny the permit application consistent with the CWA 404(b)(1) guidelines or equivalent. A permit is needed if the following criteria are met: 1) the activity is regulated under section 404 of the CWA; 2) the regulated activity will result in a discharge of fill or dredged material, and 3) the dredged or fill material will be discharged into a water of the US (WOTUS).

So, in practice jurisdictional determinations regarding whether a water is a WOTUS are made by the state during the process of determining whether a CWA 404 permit is needed. EPA retains the final say over the jurisdictional status of a water – determining if it is a WOTUS and thus covered by the CWA or not. A state may regulate more waters than the CWA covers, but in administering the CWA itself, the state must interpret the scope of federal jurisdiction to be the same as the federal definition of WOTUS. (found at: 40 CFR 230.3(s)) so as to result in the same determination regarding whether or not the water is covered under the CWA and thus is a WOTUS.

Hope this helps and let me know if you have additional questions and if it would help to get some staff experts on the phone.

Thanks,  
Mindy

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**From:** Jennifer Carr [mailto:jcarr@ndep.nv.gov]  
**Sent:** Friday, June 16, 2017 7:37 PM  
**To:** Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>  
**Subject:** 404 permitting and JD question

Hi Mindy,

I have a question about State assumption of the 404 program that I can't find an answer to on line. I am aware that states can apply for assumption of the 404 permitting program. There is a belief in my leadership team that such an assumption also would permit the states the authority to make Jurisdictional Determinations of Waters of the US vs.

waters of the State. I don't think that the latter is true, but I'm having trouble finding out which is accurate. Do you know off the top of your head?

Thanks, Jennifer



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